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WANG CUILIN v. NURUL SUHAIDA DAHLAN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAJA AHMAD MOHZANUDDIN SHAH JC
[CIVIL SUIT NO: WA-23NCvC-1-01-2021]
14 MAY 2024

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Abstract – *The jurisprudence relating to innkeepers, hoteliers, and those engaged in the hospitality industry is replete with references to a duty of care that is being imposed upon the accommodation provider who is in the business for the purpose of making a profit. It goes without saying that the hotel has a duty of care to ensure not only the comfort of the hotel guest, but his safety as a hotel guest. In this case, a hotel is found to be vicariously liable for the act of its employee, who had constituted a clear breach of duty on her part by using the access card issued to her in her capacity as a housekeeping assistant, and allowing an unauthorised person/alleged perpetrator to enter a hotel guest's room, where the hotel guest is later found murdered and robbed. The safest and correct course of action would be for the employee to verify whether a person is the rightful occupant of the room before granting him access, and such verification can be done at the reception counter or front desk office. A failure to do so can lead to the hotel being held liable for the employee's act or omission, as it permitted an unsafe standard operating procedure that can result in a fatality.*

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TORT: *Negligence – Duty of care – Breach – Hotel guest (deceased) murdered and robbed in hotel room – Whether housekeeping employee of hotel granted access to deceased's room to alleged perpetrators – Whether resulted in murder of deceased – Whether employee of hotel in violation of duties and responsibilities – Whether hotel vicariously liable for negligent act of its employee – Whether incident reasonably foreseeable based on hotel employee's acts or omissions – Whether defendants negligent in death of deceased – Adverse inference under s. 114(g) of Evidence Act 1950 – Whether invoked*

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TORT: *Negligence – Liability – Compensation – Hotel guest (deceased) murdered in hotel room as result of hotel's negligence – Whether widow of deceased entitled to damages – Pain and suffering – Loss of dependency – Special damages – Aggravated damages – Whether claim for damages allowed*

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The deceased, a Chinese national, checked into the hotel of the third defendant and had informed his wife, the plaintiff, that he was staying in Room 12743. During the deceased's stay in Malaysia, the plaintiff and the deceased communicated through the 'WeChat' application and a series of

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conversations revealed the deceased had visited the casino between 7 June 2019 and 11 June 2019 and had become a frequent winner. However, the plaintiff claimed that after their last communication by way of WeChat at 10.38am on 11 June 2019, the plaintiff sent multiple messages to the deceased, but he did not respond. In order to locate the deceased, the plaintiff contacted her friend, PW3, who went to Room 12473 on 13 June 2019 and 14 June 2019, but no one opened the door. PW3 approached hotel security to find the deceased. In response, the hotel security staff entered Room 12743 at 7.55pm on 14 June 2019 and discovered the deceased's naked body lying on the bathroom floor. In the course of the investigation, it was discovered that the deceased had been tied up at the lower face that covered the nose and mouth, at the elbows that covered the arms and body, at the wrists and hips, and at the knees and ankles. In order to tie the deceased, the perpetrators used white cloth, white towels, shoelaces and a belt. There were also bruises and abrasions consistent with trauma caused by blunt objects found on the body of the deceased, and post-mortem examination confirmed that the death was caused by suffocation. The case was classified as murder and robbery. The plaintiff flew to Malaysia on 15 June 2019. The plaintiff was informed by the police that there were two foreign nationals suspected of causing the deceased's death, a Sri Lankan named Kumar and a Pakistani named Hussain Qadeer. It was alleged that the suspects entered the deceased's room using the first defendant's key card to open the door when the deceased was away from his room. Despite a few arrests, the perpetrators had not been charged. As a result, the plaintiff, as the widow of the deceased, sued the third defendant who owned and operated the hotel where the crime took place, with the first defendant, being an employee of the hotel's housekeeping department who allowed strangers into the deceased's room, and the second defendant, being the owner of the third defendant. All the defendants were being sued for negligence. The issues that arose were (i) whether the first defendant, the second defendant and/or the third defendant owed the deceased a duty of care; (ii) whether the first defendant granted access to the deceased's room to the alleged perpetrators, which resulted in the murder of the deceased; (iii) whether the first defendant, the second defendant and/or the third defendant were negligent in the death of the deceased at the third defendant's hotel; (iv) whether the second defendant and/or third defendant were vicariously liable for the negligent act of the first defendant; and (v) whether the plaintiff was entitled to damages.

Held (allowing plaintiff's claim with costs):

(1) It was beyond dispute that the deceased was a guest at the hotel of the third defendant, ownership of which was held by the second defendant. In this regard, there was undoubtedly a duty of care that was being imposed upon the accommodation provider who was in this business for

A the purpose of making a profit. In this respect, the jurisprudence relating to innkeepers is replete with references to such duty of care. It goes without saying that the hotel has a duty of care to ensure not only the comfort of the deceased, but more importantly, his safety as a guest. (paras 32 & 33)

B **(2)** The first defendant, being a housekeeping assistant who was responsible for the maintenance and cleanliness and organisation of the guests' rooms and was entrusted with the duty of entering these rooms for their upkeep, must only confine that right of access to herself personally and not to some unauthorised parties. There was sufficient evidence to C demonstrate that the first defendant was involved in allowing unauthorised access to the deceased's room. The first defendant, while on duty on 10 June 2019, opened the door to Room 12743 for Kumar using her key, which allowed Kumar access to the deceased's room. The first defendant appeared to have opened the door to Room 12743 once D again to the same individual on 12 June 2019. Thereafter, she did not check whether this individual had exited the room after giving him access. The first defendant was therefore in violation of her duties and responsibilities. (paras 38-44)

(3) It was clear that the first defendant had allowed someone who was not E supposed to be in the deceased's room to enter twice using the key access card she had been issued in her capacity as an employee of the third defendant. Further, the cautioned statement that was made available to the court suggested that the first defendant did not verify whether Kumar was the rightful occupant of the room before granting him access to the F deceased's room. Her failure to direct any such person to the reception counter or front desk office for verification was evident. Consequently, the third defendant could be held liable for the first defendant's act or omission, as it permitted an unsafe standard operating procedure that resulted in a fatality. The first defendant's conduct in allowing G unauthorised access to the deceased's room was further supported by the testimony of the defendants' own witnesses, who confirmed the first defendant's act as documented by CCTV footage. The first defendant did not follow the procedures which led to the death of the deceased and that the incident would not have occurred if it had not been for her action. (paras 45-47)

H **(4)** The plaintiff had also filed this suit against the first defendant in order to create a complete cause of action. Moreover, the plaintiff had discharged her burden of demonstrating the involvement of the first defendant in this matter. Having done that, there was no legal I requirement for the plaintiff to call the first defendant to testify in order

to prove her case. It was the defendants' responsibility to call the first defendant or, for that matter, for the first defendant to appear in court to defend her position. Neither of these had been accomplished by them. As such, adverse inference under s. 114(g) of the Evidence Act 1950 could be drawn from the other defendants' failure to call the first defendant. In light of the evidence, the first defendant was directly connected to the act of allowing unauthorised access to the alleged perpetrators, even without the production of the first defendant or the CCTV footage. (paras 49 & 51)

(5) The deceased would have undoubtedly expected the third defendant to provide a comfortable and secure environment for him over the course of his stay. The dos and don'ts of a housekeeping assistant's responsibilities are clearly expressed including the fact that the first defendant was not permitted to use her access card or master key to grant access to anyone but the intended guests of the room. What happened to the deceased was reasonably foreseeable based on the first defendant's acts or omissions. The third defendant, and by extension on the part of the second defendant, were vicariously liable for the negligence of the first defendant. (paras 53-58)

(6) The plaintiff had a right to compensation for the pain and suffering suffered by the deceased during the time he was assaulted, stripped naked and tied up with his mouth gagged, which ultimately led to his death at some point between when the crime occurred and when he was found dead on 14 June 2019. This court awarded RM200,000 due to the uncertainty as to the actual period of time the deceased suffered, despite the fact that he was officially declared dead at 7.47am on 14 June 2019, and the estimated time of death could have been a day or two earlier. As for the plaintiff's claim for pain and suffering allegedly suffered as the widow of the deceased, based on the specific incident that occurred in this case, it should be obvious that the plaintiff suffered pain and suffering because of the fact that her husband was murdered and she had to live with that for the rest of her life. Based on the circumstances surrounding the plaintiff's facts, this court awarded RM500,000 to the plaintiff. This court also awarded the bereavement claim of RM10,000 which was the amount payable at the time of the incident. (paras 62-67)

(7) As for special damages, this court could not allow the deceased's claim for flight ticket as well as accommodation on the grounds that they were not directly caused by the defendants' negligence. This court was also not in a position to allow the plaintiff's claim for the deceased's alleged casino chips amounting to RM160,000 because the plaintiff was unable to prove that these chips were still available at the material time. This was such an uncertain situation. This court also did not allow the

plaintiff's claim of the deceased's cash value of RM5,525 and his personal belongings valued at RM5,000 at the time of death, as the plaintiff had failed to prove the existence of these amounts. However, the plaintiff's flight tickets were allowed at RM7,088.25, based on the defendant's position in which the defendants agreed that the amount was reasonable and fair. The plaintiff's transportation costs from and to the airport were also allowed at RM750. Fees of RM2,730 for visa application was allowed and RM4,060 in transportation costs was further allowed. The plaintiff was entitled to recover RM63,540 as her rental costs for her stay in Malaysia. In addition, funeral expenses in the amount of RM18,800, and RM6,860 for the costs of obtaining letters of administration were allowed. (paras 69-73)

(8) On the claim regarding the loss of dependency, despite the fact that some documents had been admitted as evidence, the weight assigned to such documents must still be determined and verified accordingly. The plaintiff had not sufficiently proved the quantum claimed at RM78,000 as per the standard required. There was also no other independent supporting evidence to adequately explain the nature and impact of the foreign documents, not to mention the veracity of such figures. Thus, the court denied the claim for loss of dependency. The plaintiff was not entitled to some of the special damages claims because she had not proven those amount of damages. As to aggravated damages, despite the negligence and liability of the defendants, there was no evidence of malice or bad faith on the part of the first defendant. There was no evidence that suggested their existence. As a result, the court did not allow this portion of the claim. (paras 74-78)

Case(s) referred to:

Dato' Stanley Issacs (Suing By Himself And As The Administrator Of The Estate Of To' Puan Suzanne Thomas, Deceased) v. The Government Of Malaysia & Ors [2019] 1 CLJ 626 HC ***(refd)***

John C Fleming & Anor v. Sealion Hotels Ltd [1987] CLJU 38[1987] 1 LNS 38 ***(refd)***

Kinta Riverfront Hotel & Suites Sdn Bhd v. Chang Yok Kee & Anor [2020] 3 CLJ 571 HC ***(refd)***

Kris Angsana Sdn Bhd v. Eu Sim Chuan & Anor [2007] 4 CLJ 293 CA ***(refd)***

Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd [2013] 6 CLJ 958 CA ***(refd)***

Projek Lebuhraya Utara-Selatan Bhd v. HMD Rais Hussin A Mohamed Ariff [2011] 10 CLJ 679 HC ***(refd)***

Sambaga Valli K R Ponnosamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal [2017] CLJU 500; [2017] 1 LNS 500 CA ***(refd)***

Teoh Guat Looi (The Lawful Widow) Claiming For Herself And Her Two Children As The Dependents Of Tay Kok Wah, Deceased v. Ng Hong Guan [1995] 1 CLJ 717 HC ***(refd)***

Wong Thin Yit v. Mohamed Ali [1971] CLJU 151; [1971] 1 LNS 151 FC ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 7, 8
Criminal Procedure Code, s. 112(5)
Evidence Act 1950, ss. 73A, 101, 103, 114(g)

For the plaintiff - Renuka Devi Krishnasamy & Tneu Wan Jing; M/s V Samy Renu & Co
For the defendants - S Nirmala & Gunaseelan; M/s Kanaga, Suresh & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Raja Ahmad Mohzanuddin Shah JC:

Preliminary

[1] The murder of a hotel guest has taken place. This occurred in the hotel room in which Xie Ning ("the deceased") was staying. Despite a few arrests, the perpetrators have not been charged.

[2] As a result, the widow of the deceased sued the third defendant, who owned and operated the hotel where the crime took place, with the first defendant being an employee of the hotel's housekeeping department who allowed strangers into the deceased's room and the second defendant being the owner of the third defendant.

[3] The plaintiff is also the administrator of the deceased's estate.

[4] All defendants are being sued for negligence.

An Overview Of The Facts Of The Case

[5] The deceased is a Chinese national. On 16 May 2019, he arrived in Malaysia and checked into the hotel of the third defendant ("hotel"). Following that, he informed the plaintiff that the room he had been given was Room 12743.

[6] During the deceased's stay in Malaysia, the plaintiff and the deceased communicated through the "WeChat" application. A series of conversations revealed that the deceased had visited the casino between 7 June 2019 and 11 June 2019, initially losing but later becoming a frequent winner.

[7] The deceased contacted the plaintiff by way of WeChat at approximately 10.38am on 11 June 2019, informing her that he had won money while gambling. It turned out that this was their last conversation. Despite sending multiple messages to the deceased, he did not respond.

[8] In order to locate the deceased, the plaintiff contacted her friend, PW3, who was at Genting Highlands and had met the deceased in the casino on 11 June 2019. PW3 searched for the deceased on 13 June 2019 but was unable to locate him. As a result, the plaintiff asked PW3 to attempt to locate the deceased at the hotel.

[9] PW3 went to Room 12743 on 13 June 2019 and 14 June 2019, but no one opened the door. In an attempt to locate the deceased, PW3 further requested the assistance of the casino's auxiliary police, but they were unsuccessful. As a result, PW3 approached hotel security to find the deceased.

[10] In response, the hotel security staff entered Room 12743 at 7.55am on 14 June 2019. Upon entering the room, they discovered the deceased's naked body lying on the bathroom floor.

[11] In the course of the investigation, it was discovered that the deceased had been tied up at the lower face that covered the nose and mouth, at the elbows that covered the arms and body, at the wrists and hips, and at the knees and ankles. In order to tie the deceased, the perpetrators used white cloth, white towels, shoelaces, and a belt.

[12] There were also bruises and abrasions consistent with trauma caused by blunt objects found on the body of the deceased. A post-mortem examination confirmed that the death was caused by suffocation.

[13] PW2 led the police investigation in which the case was classified as murder and robbery.

[14] Upon hearing of this incident, the plaintiff flew to Malaysia on 15 June 2019.

[15] The plaintiff was informed by the police that there were two foreign nationals suspected of causing the deceased's death. They were a Sri Lankan named Sarath Pushpakumara ("Kumar") and a Pakistani named Hussain Qadeer. It has been alleged that the suspects entered the deceased's room using the first defendant's key card to open the door. The deceased was away from his room at the time.

Issues To Be Tried

[16] There are thirteen common issues that the parties have raised for the court's consideration. On reviewing the closing submissions of the parties, I am able to safely rely on the following issues for determining the dispute at hand:

(i) whether the first defendant, the second defendant and/or the third defendant owe the deceased a duty of care?

(ii) whether the first defendant granted access to the deceased's room to the alleged perpetrators, which resulted in the murder of the deceased?

(iii) whether the first defendant, the second defendant and/or the third defendant were negligent in the death of the deceased at the third defendant's hotel?

(iv) whether the second defendant and/or third defendant were vicariously liable for the negligent act of the first defendant?

(v) whether the plaintiff is entitled to damages?

[17] In the subsequent analysis, the above issues will be explored together since they are clearly interrelated.

Court's Analysis And Findings

[18] The plaintiff claims that in light of the evidence presented during the trial, she has proved her case of negligence against the defendants based on a reasonable man's standard of conduct, in the sense that not only the first defendant was negligent in allowing unauthorised persons or those alleged to have committed the crime to gain access to the deceased's room, but also that the second and third defendants were vicariously liable for the negligence of the first defendant as well as for their failure to take all reasonable care to ensure the safety and well-being of the deceased as a guest of the third defendant's hotel.

[19] As such, the plaintiff alleges that the defendants breached a duty of care owed to the deceased.

[20] Conversely, the defendants take a straightforward approach that goes directly to the heart of the issues. According to them, for the plaintiff to succeed in her claim for negligence against the defendants, she must prove negligence on the basis of a balance of probabilities under s. 101 of the Evidence Act 1950.

[21] Based on their arguments, the defendants primarily focused on the issue of CCTV footage and the fact that it was not proven that the first defendant was the one who gave the alleged robbers and murderers access to the deceased's room *via* her access card.

[22] On this point, the defendants assert that the plaintiff has failed to prove that it was the first defendant who had given access to the deceased's room to the two individuals alleged to have robbed and killed him. From the defendants' point of view, it appears that SP2, who is the investigating officer assigned to investigate the murder of the deceased, testified that the CCTV located in the hallway opposite Room 12743 was blurred when SP2 checked it immediately after the incident. Although the footage can still be seen, those appearing in it cannot be identified. A further complication to the plaintiff's case, according to the defendants, is the fact that the CCTV was not even produced by the plaintiff during the trial, and that no one has confirmed that PW2 had actually seen the CCTV and requested it from the defendants.

[23] Moreover, the defendants assert that the plaintiff's photographs of the hallway did not show the presence of a CCTV camera. Also, no evidence was presented that the first defendant's access card was used to gain access to the deceased's room because no witness was called to testify to this fact.

[24] In this regard, the plaintiff is only relying on the cautioned statement allegedly made by the first defendant without, however, calling this defendant to give evidence. The defendants maintain that the plaintiff cannot establish her case by only relying on the cautioned statement. Due to this, doubt was raised as to the truthfulness of the cautioned statement. This concern was heightened since the first defendant did not even sign the statement.

[25] Having analysed the parties' positions herein, I will now proceed to determine the first foundational issue, which is the *sine qua non* of the claim, namely whether the defendants have a duty of care to the deceased.

[26] However, in order to proceed, it is necessary to determine the legal position regarding the burden of proof in a negligence claim of this nature. As far as this aspect is concerned, the trite law remains the same.

[27] To begin with, s. 101 of the Evidence Act 1950 provides that:

> 101. Burden of proof
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> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[28] Meanwhile, pursuant to s. 103 of the Evidence Act 1950, the following is provided:

> 103. Burden of proof as to particular fact
>
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[29] In this regard, a general rule has been established in *Wong Thin Yit v. Mohamed Ali* [1971] CLJU 151; [1971] 1 LNS 151; [1971] 2 MLJ 175, which provides guidance in handling a negligence action in which the onus of proof rests entirely with the party intending to present such evidence to support the claim. The following is what Ong CJ (Malaya), though in his dissenting judgment of the Federal Court, had to say at p. 175:

> In a negligence action the onus of proof rests wholly on the plaintiff, whether or not the defendant gives evidence. The plaintiff cannot succeed without proof of the defendant's negligence. "Evidence is the foundation of proof, with which it must not be confounded. Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject of inquiry. Evidence, if accepted and believed, may result in proof, but it is not necessarily proof of itself.": see *15 Halsbury* (3rd Ed) p. 260.

[30] In *Teoh Guat Looi (The Lawful Widow) Claiming For Herself And Her Two Children As The Dependents Of Tay Kok Wah, Deceased v. Ng Hong Guan* [1995] 1 CLJ 717, Hj Abdul Malik bin Hj Ishak J (as His Lordship then was) observed that a party must prove its case first before the burden of proof is shifted to the opponent. In His Lordship's words at p. 718:

> In civil cases, a party must prove his case before the burden of proof shifts to the other side. In a criminal case, the prosecution's burden is a heavy one – to prove beyond reasonable doubt. In a civil case, it is on the balance of probabilities. That balance must be tilted by the plaintiff before the defendant makes his case.

[31] As the law progresses, the Court of Appeal in *Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 6 CLJ 958 had provided guidance on the ingredients necessary to support the claimant's claim, and the standard of conduct required to determine negligence. The following is what His Lordship Abdul Malik Ishak JCA stated in His Lordship's analysis at pp. 984 and 985:

> [67] Negligence is a tort and three things must be proved to support the claimant's claim:
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> (a) that the defendant owes the claimant plaintiff a duty of care;
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> (b) that the defendant is in breach of that duty of care; and
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> (c) that the claimant plaintiff suffers damage as a result of that breach of duty and that damage is not too remote.
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> [68] According to Alderson B in *Blyth v. The Company of Proprietors of the Birmingham Waterworks* [1856] 11 Ex 781, 784:
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> > Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.
>
> [69] The standard of conduct to determine negligence is that of the reasonable man. It is an objective test.
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> [70] The *Caparo* test derived from the case of *Caparo Industries Plc v. Dickman and Others* [1990] 2 AC 605 is usually applied to cases involving physical injury and/or damage to property. The *Caparo* test requires the court to ask three basic questions:
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> (a) Whether the damage is reasonably foreseeable?
>
> (b) Whether there is a relationship of proximity between the claimant plaintiff and the defendant?
>
> (c) Whether it is just, fair and reasonable to impose a duty in such a situation?

[32] Referring back to the first issue, it is beyond dispute that the deceased was a guest at the hotel of the third defendant, ownership of which is held by the second defendant. The one that pays! In this regard, there is undoubtedly a duty of care that is being imposed upon the accommodation provider who is in this business for the purpose of making a profit.

[33] In this respect, the jurisprudence relating to innkeepers, hoteliers, and those engaged in the hospitality industry is replete with references to such a duty of care. It goes without saying that the hotel has a duty of care to ensure not only the comfort of the deceased but, more importantly, his safety as a guest.

[34] In *John C Fleming & Anor v. Sealion Hotels Ltd* [1987] CLJU 38; [1987] 1 LNS 38; [1987] 2 MLJ 440, the Singapore High Court ruled at pp. 448 and 449 that the hotel and its servants were clearly negligent in failing to safeguard the keys of their guests' rooms when unauthorised individuals gained access to their rooms:

> In this respect the defendants by their servants were plainly negligent in failing to look after the keys for their guests. It seems to me that the unauthorised person or persons who gained access to the rooms occupied by the plaintiffs must have obtained the key at that counter by quoting the room number, and the person in charge at the counter at the material time negligently parted with the key.
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> ...
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> This evidence does show that unauthorised persons could easily gain access to the lifts and go to any floor of the Hotel without being checked or stopped by a security officer. DW2's exaggerated claim that the Hotel maintained the "highest standard in terms of security" is wholly unsustainable.

[35] In *Kinta Riverfront Hotel & Suites Sdn Bhd v. Chang Yok Kee & Anor* [2020] 3 CLJ 571; [2020] MLJU 61, His Lordship Mohd Radzi Harun JC (as His Lordship then was) analysed the trite legal position that a hotel has a duty of care to ensure the safety of its guests:

> [30] That the Appellant owed a duty of care upon the Respondents to ensure their safety as guests at the Appellant hotel is trite ...
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> [31] It is my finding that the learned HMS had considered carefully the evidence before her and that she had correctly concluded that the Respondents had successfully proven their case against the Appellant's breach of its duty of care ...
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> [33] Even if there was such a deception or undue influence on the part of VCW to obtain the access card from RW, it is this Court's finding that the Appellant shall provide evidence that its staff had taken all reasonable measures to not provide the access key to VCW without the Respondents' permission. This Court found that there was no evidence adduced by the Appellant to this effect before the learned HMS.

[34] Stretching this issue further for purposes of illustration, if there was evidence shown before the HMS, through a witness or CCTV recordings, that VCW had deliberately or forcefully grabbed or snatched away the access card from RW's possession at the Reception Desk despite RW's refusal to provide him with one, then the outcome could possibly have been different. Even with that scenario, the fact that the room in question is situated at the 18th floor must have provided the Appellant's workers and staff ample opportunity and time to take appropriate actions and measures to ensure VCW does not enter the said room. Aside from that, the whole incident happened in the wee hours of the morning. The Appellant hotel's staff must therefore be alert enough to suspect something amiss when VCW appeared at such time. Any reasonable person would have called the Respondents to alert that VCW was on his way to the said room.

[35] It is my finding that those failures and omissions on the part of the Appellant's workers and staff on that fateful day had been considered carefully by the HMS, in coming to her conclusion that the Appellant should be held liable for its failure to exercise its duty of care expected of it by the Respondents as the paying guests at the Appellant's hotel.

[36] In my judgment, having regard to all the circumstances of the case, the Respondents had proven their case against the Appellant on the balance of probabilities. The damages and injuries sufferred by the Respondents was directly caused by the negligence of the Appellant, through the omission and/or commission of the acts of the Appellant's staff.

[36] With the law in hand, I will weigh the facts of the case in accordance with it.

Liability

[37] From this perspective, the duty of care would only be established and affirmed if it could be demonstrated that the first defendant had, in fact, breached this duty while serving as the third defendant's hotel's housekeeping assistant. Therefore, in order for the first defendant to be considered in breach, it becomes essential to analyse whether she was responsible for the allegations made against her by the plaintiff.

[38] As a matter of law, the first defendant, if proven to have allowed the alleged perpetrators access to the deceased's room, would be held responsible for breaching such a duty of care. The first defendant, being a housekeeping assistant who was responsible for the maintenance of the cleanliness and organisation of guests' rooms and was entrusted with the duty of entering these rooms for their upkeep, must only confine that right of access to herself personally and not some other unauthorised parties. If this scenario is proven to be true, then she would be in violation of her duties and responsibilities, which in turn would be a basis for determining the extent of her employer's liability.

[39] In dealing with this matter, I will address the issues raised by the defendants.

[40] The first relates to the non-production of CCTV footage and other related issues as discussed above.

[41] As for the CCTV footage, I find that the plaintiff has discharged her burden of proving both the existence of such CCTV despite its non-production and the role of the first defendant in this incident.

[42] After reviewing PW2's testimony, I have no reason to doubt his credibility, since he remains an uninterested party in this matter. Despite the fact that the CCTV footage appeared blurry according to PW2, there can be no escaping the fact that his evidence was clearly related to his own investigation in which he obtained information regarding the first defendant's role through the first defendant's own admission in the cautioned statement.

[43] From this point of view, there is sufficient evidence to demonstrate that the first defendant was involved in allowing unauthorised access to the deceased's room. Despite the absence of CCTV footage, this particular fact will remain unchanged, as I am capable of assessing the facts on the basis of other credible evidence. In addition to this, the plaintiff is also entitled to rely on the doctrine of *res ipsa loquitor*. Based on the combination of evidence, it appears that the facts speak for themselves.

[44] On the basis of the cautioned statement given by the first defendant after she was arrested, it appears to me that the first defendant, while on duty on 10 June 2019, opened the door to Room 12743 for Kumar using her key, which allowed Kumar access to the deceased's room. That is not the end of it. The first defendant appeared to have opened the door to Room 12743 once again to the same individual on 12 June 2019. Thereafter, she did not check whether this individual had exited the room after giving him access. Soon after, the deceased entered the room and came out again to speak with the first defendant. However, the first defendant did not understand the deceased's language or what he was saying. This prompted the deceased to return to the room.

[45] In light of this evidence, on which I am relying, it is clear that the first defendant allowed someone who was not supposed to be in the deceased's room to enter twice using the key access card she had been issued in her capacity as an employee of the third defendant. Further, the cautioned statement that was made available to the court suggests that the first defendant did not verify whether Kumar was the rightful occupant of the room before granting him access to the deceased's room. In this context, there appears to be no way for her to verify every guest staying in a hotel room, so the safest and correct course of action would be to direct any such person to the reception counter or front desk office for verification. Her

failure to do so was evident. Consequently, the third defendant can be held liable for the first defendant's act or omission, as it permitted an unsafe standard operating procedure that resulted in a fatality.

[46] As for the cautioned statement, the defendant challenges the cautioned statement as non-compliant with s. 112(5) of the Criminal Procedure Code since the statement does not contain an attested signature. On this point, I find that the findings of the investigation by PW2 remain undisturbed. The claim at hand is, in any case, only a civil one against the defendants in terms of their liability, and not a criminal one against which the first defendant is being attempted to be charged with murder. As a result, I accept PW2's testimony in this regard, as it does not appear to be contradictory in any way.

[47] Despite this, it is imperative to note that the above factors are not the only ones that have influenced my findings. In fact, the first defendant's conduct in allowing unauthorised access to the deceased's room is further supported by the testimony of the defendants' own witnesses, who have confirmed the first defendant's act as documented by CCTV footage.

[48] To this extent, DW 2, as the second defendant's assistant vice president, admitted during cross-examination that the first defendant did not follow the procedure which led to the death of the deceased and that the incident would not have occurred if it had not been for her action. Furthermore, DW2 agreed that there was no reason for the first defendant to allow Kumar access to the room. In addition, even DW3, the second defendant's senior assistant security manager, agreed under cross-examination that the first defendant had admitted to him that she had granted access to the perpetrators.

[49] With regard to the issue of the plaintiff not calling the first defendant to testify, it is relevant to note that all defendants in this case are fully represented, and therefore, it is the responsibility of the remaining defendants to call the first defendant. From the plaintiff's perspective, she has also filed this suit against the first defendant in order to create a complete cause of action. Moreover, the plaintiff has discharged her burden of demonstrating the involvement of the first defendant in this matter. Having done that, there is no legal requirement for the plaintiff to call the first defendant to testify in order to prove her case. The burden has now shifted to the defendants to refute this allegation. As a matter of fact, it is the other defendants' responsibility to call the first defendant or, for that matter, for the first defendant to appear in court to defend her position. Neither of these has been accomplished by them. As such, I agree with the plaintiff that adverse inference under s. 114(g) of the Evidence Act 1950 can be drawn from the other defendants' failure to call the first defendant.

[50] The issue does not end here. For me, it is important to analyse the defendants' defence regarding whether the first defendant had allowed access to the alleged perpetrators. In examining the defence in detail, it appears that the defendants hold the position that, following the influence of one of the alleged perpetrators, Kandage Sarath Pushpakumara, the first defendant allegedly believed that he was the true occupant of Room 12743, and not that she was not involved in enabling access to the room.

[51] In light of the evidence presented to the court, it appears to be so clear that the first defendant is directly connected to the act of allowing unauthorised access to the alleged perpetrators, even without the production of the first defendant or the CCTV footage.

[52] On the issue of whether the second defendant and/or the third defendant were vicariously liable for the act of the first defendant, I find that what had happened here constituted a clear breach of duty on the part of the first defendant as an employee of the third defendant. By using the access card issued to her in her capacity as a housekeeping assistant, she allowed an unauthorised person to enter the deceased's room twice.

[53] In this sense, the deceased would have undoubtedly expected the third defendant to provide a comfortable and secure environment for him over the course of his stay. The plaintiff's position is further strengthened by DW1's testimony being the third defendant's guest service manager. In this regard, the dos and don'ts of a housekeeping assistant's responsibilities are clearly expressed, including the fact that the first defendant is not permitted to use her access card or master key to grant access to anyone but the intended guests of the rooms.

[54] In addition, and perhaps most noteworthy, DW1's impactful testimony was when she agreed with the suggestion made by learned counsel for the plaintiff that the deceased died solely as a result of the negligence of the second and third defendants in ensuring the safety of their guests and customers, which resulted in the plaintiff's losses, including the loss of her husband.

[55] As far as I am concerned, the fact that DW2 testified that there was no malicious intent and connivance on the part of the first defendant to cause the death of the deceased is irrelevant to my consideration in this case. Housekeeping assistants were only allowed access to rooms to clean them and then leave. Furthermore, DW3 testified that as a housekeeping assistant, the first defendant had a duty and responsibility to ensure that only the guests of each room had access to their rooms in the event that the guests were unable to enter their rooms for some reason.

[56] A further testimony was given by DW3 that the second and third defendants had a duty of care to ensure that all employees were trained to ensure the safety of their guests, and therefore they were vicariously liable for the negligence of the first defendant.

[57] Taking into account the circumstances as highlighted in the preceding paragraphs, I am also of the opinion that what happened to the deceased was reasonably foreseeable based on the first defendant's acts or omissions. In addition, I am aware that the defendants have taken the stand in their defence against the plaintiff's claim of negligence, stating that the death of the deceased was simply an unforeseeable accident. However, since my findings have shown that there is no doubt that the deceased was murdered, the defendants are no longer able to rely on this line of defence, further validating my findings.

[58] In light of the findings as outlined above, I conclude that the third defendant, and by extension on the part of the second defendant, are vicariously liable for the negligence of the first defendant.

[59] As for the issue of its own liability, I find that the second defendant did not raise this issue during the trial of this action or even at the stage of closing arguments. It is only in their defence that this issue has arisen, which is limited to the fact that the first defendant is an employee of the third defendant as well as the fact that the third defendant is the proper entity responsible for managing the third defendant's hotel rather than the second defendant. As such, I am treating the second defendant's silence on this issue as a reflection of their position. In this regard, it will not be my duty to deal with an issue that has not been raised by the relevant party.

General Damages

[60] As the above findings have been made regarding liability, I will now turn to the analysis of the quantum of damages that the plaintiff is claiming under ss. 7 and 8 of the Civil Law Act 1956 ("Act"). On this subject, s. 7 of the Act deals with the death of a person caused by a wrongful act as well as the entitlement to maintain an action and recover damages for such death, while s. 8 of the Act deals with the matter whereby all causes of action against or vested in a deceased individual shall survive against or for the benefit of his estate on his death.

[61] As a starting point, I find that the defendants have not disputed the plaintiff's locus in bringing this claim. The defendants are only disputing the plaintiff's and the deceased's entitlement under the relevant head of damages, apart from disputing liability.

[62] The first category of damages is related to the deceased's pain and suffering. Accordingly, I conclude that the plaintiff has a right to compensation for the pain and suffering suffered by the deceased during the

time he was assaulted, stripped naked, and tied up with his mouth gagged, which ultimately led to his death at some point between when the crime occurred and when he was found dead on 14 June 2019. In light of this evidence which I consider to be credible, even though it is impossible for me to determine the exact time of death and the exact state of consciousness of the deceased, it is difficult for me to accept that as the deceased suffered mental torture accompanied by trauma and physical pain that resulted in such a horrendous death, the deceased did not suffer any pain or suffering. In light of such a tragic incident, I am in a position to infer that some form of damages have been sustained as a result. Consequently, I reject the defendants' argument that the deceased did not suffer any pain and suffering since he died instantly. After all, it is important to be aware of the fact that suffocation and positional asphyxia caused the deceased's death.

[63] Nevertheless, I am only awarding RM200,000 due to the uncertainty as to the actual period of time the deceased suffered, despite the fact that he was officially declared dead at 7.47am on 14 June 2019, and the estimated time of death could have been a day or two earlier. It is important to emphasise that in this case, I am not undermining the severity of the incident that led to the allegations of negligence and the commission of a crime by refusing the plaintiff's claim of RM500,000. However, notwithstanding that my conclusion rests on this aspect of damages claimable under the general position of the law on damages, it remains true, however, that no one could have imagined the suffering the deceased would have endured at that time. Rather than being the victim of any other form of negligence, the deceased was murdered. On the basis of the nature and region of damages awarded in other cases, RM200,000 appears to be a reasonable amount to be awarded under this head of claim.

[64] This can be illustrated by the following example. In *Dato' Stanley Issacs (Suing By Himself And As The Administrator Of The Estate Of To' Puan Suzanne Thomas, Deceased) v. The Government Of Malaysia & Ors* [2019] 1 CLJ 626, a sum of RM100,000 was awarded due to the deceased's considerable pain and suffering during her hospitalisation, which included respiratory distress, unrelieved right ankle pain, delirium, nausea, vomiting, impaired consciousness, loss of consciousness, convulsions, hypoxia, brain infarction, hyperglycaemia and microcirculation imbalance.

[65] I will now discuss the plaintiff's claim for pain and suffering allegedly suffered as the widow of the deceased. In this regard, although I agree that there was no medical report produced to show the plaintiff's state of mind in regard to this, I believe that based on the specific incident that occurred in this case, it should be obvious that the plaintiff suffered pain and suffering because of the fact that her husband was murdered and she has to live with that for the rest of her life. Based on the circumstances surrounding the plaintiff's facts and the amounts awarded in some of the authorities cited by the plaintiff, I am awarding RM500,000 as opposed to RM2 million as claimed by the plaintiff.

[66] When considering the quantum of damages, I compared the case at hand with others. For instance, in *Kris Angsana Sdn Bhd v. Eu Sim Chuan & Anor* [2007] 4 CLJ 293, a substantial amount of RM1,000,000 was awarded. This was due to the plaintiff's severe health deterioration as a direct result of witnessing his house disintegrate following the tortfeasor's actions. Meanwhile, in *Sambaga Valli K R Ponnosamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal* [2017] CLJU 500; [2017] 1 LNS 500, despite the plaintiff not presenting a medical record to support her claim of stress and trauma caused by the defendants' trespass, RM500,000 was still awarded by the Court of Appeal as general damages. In this case, the defendants wrongly seized the plaintiff's goods, resulting in her loss of business capital which forced her to sell her assets in order to repay her business creditors.

[67] In addition, I am awarding the bereavement claim of RM10,000, which was the amount payable at the time of the incident. This type of claim is also different from the plaintiff's claim for general damages resulting from pain and suffering.

Special Damages

[68] I will now proceed to the claims involving special damages.

[69] For the claims concerning the deceased's flight ticket from Shenyang to Kuala Lumpur as well as the deceased's accommodation at the third defendant's hotel, I do not allow this claim on the grounds that they were not directly caused by the defendants' negligence. It appears that this was the third time the deceased visited Genting Highlands Casino in recent years.

[70] Regarding the plaintiff's claim for the deceased's alleged casino chips amounting to RM160,000, I am not in a position to allow it because the plaintiff is unable to prove that these chips were still available at the material time. They could have been stolen from the deceased, or the deceased could have lost the money while at the casino. This is such an uncertain situation. Further, I am unable to accept the plaintiff's proof of the value of the chips, which according to the plaintiff, is worth RM 160,000 solely on the basis of the photograph sent by the deceased to the plaintiff. I must keep in mind that the photograph was sent on 7 June 2019 and the incident occurred on 14 June 2019. During that seven-day period, many things could happen. As for this aspect, even PW2 was unable to confirm where the chips were placed during that period and their exact value. I am also not in agreement with the plaintiff that the defendants have the duty to verify this amount. In this regard, the plaintiff still bears the burden of proving this fact. Moreover, the plaintiff has also failed to file the relevant interlocutory application to obtain this information as part of the trial preparation process.

[71] Likewise, I do not allow the plaintiff's claim of the deceased's alleged cash value of RM5,525 and his personal belongings valued at RM5,000 at the time of death, as the plaintiff has failed to prove the existence of these

amounts. In addition, I am not allowing the plaintiff's claim for transportation to Genting Highlands involving the payment of RM650 to PW3 since there is no evidence before this court supporting PW3's alleged cancellation of an expedition that she was supposed to go. According to the plaintiff, PW3 had paid RM650 to go on the expedition on that relevant date which she had to cancel because she had to assist the plaintiff in finding her husband.

[72] Next, the plaintiffs flight tickets are allowed at RM7,088.25 based on the defendants' position in which the defendants agree that the amount is reasonable and fair. The plaintiff's transportation costs from and to the airport are also allowed at RM750 in accordance with the defendants' similar position. Fees of RM2,730 for visa applications are allowed in accordance with the defendants' position. RM4,060 in transportation costs is further allowed based also on the defendants' position. Taking into account the defendants' similar position, the plaintiff is entitled to recover RM63,540 as her rental costs for her stay in Malaysia.

[73] In addition, funeral expenses in the amount of RM18,800 are allowed. RM6,860 is allowed for the cost of obtaining the letters of administration. Receipts have been issued for these claims.

[74] On the claim regarding the loss of dependency, despite the fact that some documents have been admitted as evidence, the weight assigned to such documents must still be determined and verified accordingly. The admission of documents into evidence, in the form of the deceased's company's balance sheets for the years 2016, 2017 and 2018 ("P28", "P29" and "P30"), does not automatically imply the truthfulness of the contents. Likewise, the statement of proof of income for the deceased purportedly showing the deceased's monthly income of CNY50,000, was not admitted into evidence ("ID31"). As part of this amount, the plaintiff was allegedly given CNY20,000 each month. In this regard, if a maker can be produced for cross-examination, it will help this court evaluate the weight of the evidence. Despite this, the plaintiff failed to bring such a witness to the trial, even *via* Zoom. As a result, I find that the plaintiff has not sufficiently proven the quantum claimed of RM78,000 as per the standard required. There is also no other independent supporting evidence to adequately explain the nature and impact of the foreign documents before me, not to mention the veracity of such figures.

[75] As a result of the above findings, I am not in a position to award the plaintiff's requested amount even if ID31 is admitted into evidence under s. 73A of the Evidence Act 1950. For these reasons, I am denying the claim for loss of dependency.

[76] At this point, I must reiterate that the plaintiff is not entitled to some of the special damages claims because she has not proven those amounts of damages. In this regard, I refer to Her Ladyship Hadhariah Syed Ismail JC's (as Her Ladyship then was) judgment in *Projek Lebuhraya Utara-Selatan Bhd v. HMD Rais Hussin A Mohamed Ariff* [2011] 10 CLJ 679, in which Her Ladyship observed at p. 687:

> [23] There was no supporting document. According to PW1, the figure was recommended by a second hand car dealer. There was also no independent witness to certify the depreciated value. I agree entirely with the appellant's contention that the respondent is not a fit and proper person to testify on the value of his own car. The best person to testify must be the person from the automobile industry who deal with Mercedes car. Without the independent evidence, the respondent's evidence at best is to be regarded as a self service statement which is not safe to be relied upon by the court and should be rejected. If the respondent's evidence is to be accepted it would create a dangerous precedent of giving an easy way of proving special damages. Unless the court uphold the principle of law, it would create harsh result and caused injustice to the party sued.

[77] As to aggravated damages, I conclude that, despite the negligence and liability of the defendants, there was no evidence of malice or bad faith on the part of the first defendant. There is no evidence before me that suggests their existence. As a result, I am not allowing this portion of the claim.

[78] On exemplary damages, the plaintiff is unable to prove this part of the claim due to my finding that the defendants did not exhibit any vindictiveness, malice or even contumelious disregard.

[79] Regarding interest rates, I am awarding interest on general damages at the rate of 5% per annum from the date of service of the writ until the date of judgment. I am also awarding interest on special damages at the rate of 2.5% per annum from the date of the deceased's death until the date of judgment. Interest at the rate of 5% per annum on the judgment sum is also being awarded from the date of judgment to the date of payment.

Conclusion

[80] Having made the foregoing findings, I am therefore allowing the plaintiff's claim with costs of RM75,000, subject to allocatur.